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VIA ELECTRONIC FILING

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: *Ex Parte*, CC Dockets 98-141, 98-184 and 01-338, and WC Docket 04-313

Dear Ms. Dortch:

On September 9, 2004, we filed a Petition for Declaratory Ruling on behalf of 37 CLECs seeking a determination that SBC and Verizon remain subject to the unbundling requirements of the respective merger conditions adopted by the Commission in Dockets 98-141 and 98-184.[1] The Petition explained that prompt Commission action is needed to resolve this controversy before SBC or Verizon seeks unilaterally to implement changes to its unbundling practices that would conflict with their merger obligations. It is now apparent that the parties' conflicting positions on the merger conditions are likely to collide head-on when the Commission's *Triennial Review Remand Order* ("*TRRO*") becomes effective on March 11, 2005.[2] If the

[1] Of these companies, this letter is submitted on behalf of Access One, Inc.; ACN Communications Services, Inc.; Alpheus Communications, L.P. f/k/a El Paso Networks, L.P.; ATX Communications, Inc.; Biddeford Internet Corporation d/b/a Great Works Internet; Big River Telephone Company, LLC; BullsEye Telecom, Inc.; Capital Telecommunications, Inc.; Cavalier Telephone, LLC; CTC Communications Corp.; CTSI, Inc.; Focal Communications Corp.; Freedom Ring Communications, LLC d/b/a BayRing Communications; Gillette Global Network, Inc. d/b/a Eureka Networks; Globalcom, Inc.; Intelecom Solutions, Inc.; KMC Telecom Holdings, Inc.; Lightship Telecom, LLC; Lightwave Communications, LLC; Lightyear Network Solutions, LLC; McGraw Communications, Inc.; McLeodUSA Inc.; Mpower Communications Corp.; RCN Telecom Services, Inc.; segTel, Inc.; TDS Metrocom, LLC; US LEC Corp.; and Vycera Communications, Inc.

[2] Verizon has notified many CLECs that it intends to implement the *TRRO* rules immediately on March 11, apparently regardless of any well-founded objections a CLEC may have. SBC, meanwhile, has demanded that CLECs sign an interconnection agreement amendment by March 10 that would in SBC's view implement the *TRRO* and the elimination of SBC's merger obligations. SBC has not clarified to CLECs what it plans to do if they do not sign the proposed amendment. *See* Exhibits 1, 2 (Letters to CLECs from Verizon and SBC); *see also* Docket 04-313, ALTS February 22, 2005 *Ex Parte* letter to Jeffrey Carlisle. However, CLECs cannot reasonably be expected to sign SBC's proposed amendment and hope for a later reprieve when the Commission or a state commission or court vindicates their position on the merger conditions. Among other reasons, SBC has recently argued to the D.C. Circuit in *SBC v. FCC II* that a CLEC that enters into an interconnection agreement that does not reflect SBC's merger condition obligations waives any right to receive UNEs pursuant to the merger conditions.

Commission does not resolve the Petition before that date, CLECs may be forced to scramble to defend their rights under the merger conditions before courts or dozens of state commissions, during which time SBC and Verizon could be denying access to UNEs under the very circumstances that the Commission's merger conditions were designed to remedy. We therefore urge the Commission to grant the Petition prior to March 11.

In the event that the Commission is unable to rule on the Petition before March 11, it could and should at least partially offset the potential for such consequences by issuing clarifications or modifications of the *TRRO* described below. These clarifications would help to prevent SBC and Verizon from overextending the relief that the *TRRO* intended to grant, and would thus contain the extent of the injuries that CLECs would sustain if SBC or Verizon chooses to violate their merger obligations on or after March 11.

Requested Clarification #1: The *TRRO* Does Not Override Interconnection Agreements

The Commission has made clear in prior orders that its new rules did *not* purport to override Congress' framework for unbundling obligations to be implemented pursuant to the negotiation and arbitration process of section 252 of the Act. For example, the *Triennial Review Order* explicitly rejected "the request of several BOCs that we override the section 252 process and unilaterally change all interconnection agreements," finding that the Commission should not take the "extraordinary step of ... interfering with the contract process."[3] The *TRRO* similarly references the need for parties "to modify their interconnection agreements, including completing any change of law processes," and that "the transition mechanism adopted here is simply a *default process*, and pursuant to section 252(a)(1), carriers remain free to negotiate alternative arrangements superseding this transition period."[4] The "Implementation of Unbundling Determinations" section of the *TRRO* further provides that "We expect that incumbent LECs and competing carriers will implement the Commission's findings as directed by section 252 of the Act," and that "carriers must implement changes to their interconnection agreements ...[in a manner that] will not *unreasonably* delay implementation of the conclusions adopted in this Order."[5] Given this language and Commission precedent, it is reasonable for CLECs and state commissions to assume that the Commission did not purport to override section 252 or the change of law terms of the parties existing contracts.

However, SBC and Verizon appear to be asserting that the *TRRO* authorizes them as of March 11 to ignore the provisions of their existing agreements by immediately refusing to accept new orders for UNEs that they believe, in their unilateral judgment, have been affected by the *TRRO*. It also appears that, to the extent that the ILECs are unsuccessful in immediately implementing the *TRRO*, they may later try to impose a true-up on such UNEs back to March 11, even as to CLECs whose contracts do not include true-up provisions. Some interconnection agreements specifically provide for a true-up where there has been a change of law, and where applicable such provisions would of course apply to the UNEs affected by the *TRRO*. However, where the parties' existing contracts do not provide for such true-up, imposition of true-up would override the section 252 agreements negotiated by the parties or adopted in a state commission

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[3] *Triennial Review Order* at ¶ 701.

[4] *Triennial Review Remand Order* at ¶¶ 145, 198, 228 (emphasis added)

[5] *Triennial Review Remand Order* at ¶ 233 (emphasis added).

arbitration. Clearly, CLECs whose interconnection agreements require the adoption of an amendment before the ILEC can stop accepting new orders or reprice existing ones will object to any attempt at unilateral implementation by SBC or Verizon. To avoid these disputes before they start, the Commission should clarify, as it did in the *TRO*, that it the *TRRO* transition terms are a default process that does not take the "extraordinary step of ... interfering with the contract process."

In the absence of such clarification from the Commission, CLECs may out of caution be compelled to seek review of this issue in the Court of Appeals. CLECs have previously demonstrated that the Commission does not have the authority to override section 252 or the change of law terms of existing state-approved interconnection agreements. In the *TRO*, the Commission rebuffed the RBOCs' contentions that the *Mobile-Sierra* tariff doctrine would allow the Commission to "negate" contract rights, noting that CLECs "have forcefully argued that the *Mobile-Sierra* doctrine does not apply to interconnection agreements that are filed with the states."[6] The Commission should avoid litigation of this issue by making even more clear, as it appears to have intended, that the *TRRO* can only be implemented in accordance with the change of law provisions of the parties' interconnection agreements, and that the Order does not override such terms.

Requested Clarification #2: Clarifications to the Fiber-Based Collocator Tests in Light of the Planned SBC/AT&T and Verizon/MCI Acquisitions

The recent announcements of SBC and Verizon of their plans to acquire AT&T and MCI, respectively, significantly raises the prospect that some wire centers that might arguably meet the *TRRO*'s impairment thresholds on March 11 would no longer meet the thresholds if and when these acquisitions become effective. The Commission should consider at least two clarifications to its tests for loop and transport impairment to assure that their purpose is not undermined by these planned acquisitions or by other future ILEC acquisitions of other fiber-based competitors.

First, the Commission should clarify that its definition of "affiliated" fiber-based collocators in Rule 51.5 includes any carrier that the ILEC has agreed to acquire or to become affiliated with. Specifically, for example, the impairment analysis should treat AT&T as an affiliate of SBC and MCI an affiliate of Verizon. It would be unreasonable for the Commission to include the AT&T and MCI collocations as evidence of non-impairment when AT&T and MCI themselves have determined that their business models should not continue independent of a BOC affiliation, and when their facilities might soon become unavailable to competitors on any terms other than those available from the ILEC. Given SBC's and Verizon's plans to try to implement the *TRRO* immediately, rather than through the state commission arbitration process, the Commission should make this clarification prior to March 11 to avoid unproductive and unnecessary temporary disruption to UNE access on routes that would only be deemed non-impaired were AT&T and MCI to remain independent.

Second, the Commission should clarify the provisions in the revised Rules 51.319(a)(4) and (5) that once a wire center exceeds the impairment thresholds that no future unbundling will be required in that wire center. As written, the ILECs may argue that these provisions operate as a permanent ban on reopening the wire center to UNE access even if the wire center later falls

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[6] *See TRO* at fn. 2084 (citing several CLEC ex parte letters).

below the thresholds. Clarification to the contrary is particularly important in the event that the Commission does not previously make clear that the AT&T and MCI collocation arrangements do not count in the SBC and Verizon regions, respectively. If the impairment thresholds were interpreted as irreversible one-way ratchets, the ILECs would have a perverse incentive to try to allow a wire center to pass the threshold for a short period of time and then, as soon as UNE access was permanently eliminated, try to close the wire center to competition. For example, ILECs could try to acquire any independent fiber-based collocator that makes wholesale access available to competitors, as they are now doing with AT&T and MCI. There is no sound policy basis to permanently foreclose future UNE access even when the facts that led to UNE elimination change.

Requested Clarification #3: The Bar on New Orders Applies Only to New Customers, Not Moves, Adds and Changes to Existing Customer Arrangements

The *TRRO* provides that CLECs subject to the transition rules may not obtain "new" UNE-P arrangements or "new" dedicated transport or loop UNEs have been designated for elimination. While CLECs understand that these terms would, where applicable, bar UNE orders to serve new end-user customers, the Order should be revised to make even more clear that CLECs could continue to modify or augment UNE arrangements serving existing customers. We believe the Order already clearly makes this distinction, as it provides that the transition terms apply "only to embedded *customer base,*" and not just to the precise facilities currently used to serve that customer base.[7] The *TRRO*'s references to "new" orders are contrasted with orders to serve the embedded customer base.[8] However, despite this language, SBC has already indicated that it will interpret the bar on new orders to include moves, migrations and "new lines added to existing" embedded customer arrangements.[9]

A clarification to allow moves, adds and changes for the existing embedded base is needed prior to the *TRRO*'s effective date. For example, at any moment, a CLEC using transitional UNE-P could receive a request from one of its customers to add a line or a service feature. Customers expect their carriers to be able to process such routine requests seamlessly and expeditiously, and a CLEC cannot decline such requests without risking losing the customer. If ILECs were permitted to reject a CLEC order to fulfill such a request on the basis that it would be a "new UNE-P arrangement," the CLEC would be immediately deprived of the Commission's plan to assure "adequate time for both competitive LECs and incumbent LECs to perform the tasks necessary to an orderly transition."[10] The CLECs' attempts at organizing orderly transitions could constantly be disrupted by *ad hoc* needs that arise without warning to move certain arrangements every time a customer requested even trivial changes to their service before the CLEC could complete its regularly-scheduled transition of the facilities that underlie that particular customer's service. Meanwhile, the end user customer could be subjected to otherwise avoidable delays or disruptions in receiving their requested modifications, or could even be

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[7] *TRRO* at ¶¶ 142, 195, 227 (emphasis added).

[8] *Id.*

[9] See Exhibit 2, SBC Accessible Letter CLECALL 05-017 (UNE-P); see also SBC Accessible Letter CLECALL 05-019 (loops and transport).

[10] *TRRO* at ¶ 227, ¶ 143 (same for transport) and ¶ 196 (same for high-capacity loops).

forced to change carriers in order to get the services they need on time. Such senseless disruptions would undermine the purpose of the transition rules. Therefore, the Commission should clarify that the bar on "new" loop, transport and switching UNEs during the transition period applies only to facilities that would serve new end-user customers.

Requested Clarification #4: CLECs Can Obtain 10 DS1 EELs per *Building*, Not per Wire Center

The Commission should also clarify that the restriction limiting CLECs to 10 DS1 transport circuits on a particular route (*see TRRO* ¶ 128) does not apply to the transport portion of DS1 loop-transport EEL combinations. Instead, DS1 EELs should be subject only to the 10-per-building restriction that applies to DS1 loops (*see TRRO* ¶ 181). The Commission's stated purpose of this restriction on DS1 transport is that a CLEC desiring more than 10 DS1 transport circuits could order a DS3 UNE instead. However, a CLEC using EELs is typically not collocated at the wire center and could not aggregate the traffic to a DS3 transport. Thus, as a practical matter, application of the transport capacity restriction to EEL combinations would limit a CLEC to 10 EELs per wire center, rather than per building.

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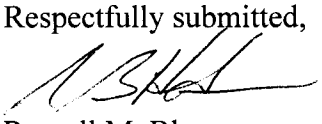
The requested clarifications described above do not replace the need for Commission action on the Petition for Declaratory Relief by March 11. However, in the event that the Commission is unable to reach a decision on the merger conditions Petition by that date, these clarifications should reduce the damages that CLECs would seek in a future enforcement action. In addition, these clarifications would advance the Commission's objectives and the public interest regardless of its determinations on the merger conditions Petition.

Respectfully submitted,



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